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WHAT IS A VESSEL? A THREE PRONG APPROACH

JEFF NEMEROFSKY¹

I.	INTRODUCTION	705
II.	BACKGROUND.....	706
	A. <i>The Problem</i>	706
	B. <i>Definitions of “Vessel” Found in Other Admiralty Statutes</i>	707
III.	AUTHOR’S ANALYSIS.....	709
	A. <i>Historical Perspective</i>	709
	1. History of the Jones Act	709
	2. First, There Must be a Seaman	711
	3. In Navigation	713
	B. <i>Analysis</i>	717
	1. The United States Code Definition.....	718
	2. Comparison to the Longshore Harbor Workers’ Compensation Act	720
	3. Resolution.....	723
	a. <i>The Car Analogy</i>	724
	b. <i>The Three Prong Test</i>	727
	c. <i>Airplanes and Helicopters</i>	733
IV.	CONCLUSION.....	736

I. INTRODUCTION

The seemingly simple question of, “what is a vessel?” has a very complex answer. In the context of United States admiralty law, the definition of the word “vessel” has different meanings depending upon which statute has jurisdiction, the nature of the circumstances, and the characteristics of the person involved. There is no settled definition of the word. As a result, the character of ships and vessels can hardly be denied to almost any structure, including steam-ships,² motor driven tugs,³ canal boats drawn by animal power,⁴ jet skis,⁵ a floating elevator,⁶ and a houseboat.⁷

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²See *The Devonshire*, 13 F. 39 (C.C.D. Or. 1882) (arguing that the British steam-ship *Devonshire* was a vessel under the Act of March 3, 1855).

³See *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1 (1937) (including motor driven tugs as vessels for purposes of inspection and regulation).

⁴See *The Robert W. Parsons*, 191 U.S. 17 (1903) (holding that canal boats drawn by animal power on the Erie Canal were vessels).

Conversely, sometimes structures that are commonly thought of as vessels are denied such status under the law.⁸ For instance, if one is suing their employer for injuries suffered on a barge, the claim may be denied,⁹ regardless of how gruesome the wounds, if the barge is determined not to be a "vessel."

The Jones Act is a statute designed to cover seamen injured by the negligent acts of their employer, and is indicative of other admiralty statutes which, by their lack of a specific definition of the word "vessel,"¹⁰ have created controversy in the judicial system. An analysis of a Jones Act "vessel," therefore, is a good vehicle by which one can examine this issue in greater depth. In the analysis of a Jones Act vessel, an inquiry into a Jones Act seaman is a necessary first step.

This comment proposes a three prong test that suggests several criteria to be used by the trier of fact for determining whether something meets the definition of a "vessel." The objective is to provide a tool that can be used in a variety of situations involving different admiralty statutes in an effort to produce a more consistent understanding.

II. BACKGROUND

A. *The Problem*

Courts considering the question of whether a particular structure is a vessel typically find the term "is not capable of precise definition."¹¹ "Much as we would like to formulate a definition of 'vessel' that captures the essence of the seagoing definiendum, no platonic form suggests itself, hence we are left with the halting efforts of the common law."¹²

Even in more common usage, the word seems to take on different meanings. Webster's Third New International Dictionary describes "vessel" as, "a watercraft or

⁵See *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225 (11th Cir. 1990) (holding that a jet ski was a vessel covered by the Limitation of Liability Act, ch. 521, 49 Stat. 1479 (1936) (codified at 46 U.S.C. app. §§ 181-196 (1994))).

⁶See *The Hezekiah Baldwin*, 12 F. Cas. 93 (E.D.N.Y. 1876) (No. 6,449) (holding that a floating elevator used in New York harbor was a vessel subject to a maritime lien).

⁷See *Miami River Boat Yard, Inc. v. 60' Houseboat*, 390 F.2d 596 (5th Cir. 1968) (holding that a powerless houseboat was a vessel capable of being subjected to a maritime lien).

⁸See *Garret v. Dean Shank Drilling Co.*, 799 F.2d 1007 (5th Cir. 1986) (holding that an injured worker was not entitled to recovery under the Jones Act because the barge upon which he was working was not a vessel in navigation).

⁹*Id.*

¹⁰See 46 U.S.C. app. § 688 (1994).

¹¹*Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 829 (5th Cir. 1984). In the case of *Offshore Co. v. Robison*, Judge Wisdom noted, "[a]ttempts to fix unvarying meanings . . . to such terms as 'seaman' [and] 'vessel'. . . must come to grief on the facts." 266 F.2d 769, 779 (5th Cir. 1959). "Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts." *Id.* at 780.

¹²*McCarthy v. The Bark Peking*, 716 F.2d 130, 136 (2d Cir. 1983).

structure with its equipment whether self-propelled or not that is used or capable of being used as a means of transportation in navigation or commerce on water and that usu[ally] excludes small rowboats and sailboats.”¹³ Black’s Law Dictionary defines “vessel” as, “[a] ship, brig, sloop, or other craft used, or capable of being used, in navigation on water.”¹⁴ Royal Caribbean Cruise Lines states on their ticket, “[t]he word ‘Vessel’ shall mean any ship, chartered, operated or provided by Royal Caribbean Corp. on which the Passenger may be traveling or, as the case may be, against which the Passenger may assert a claim.”¹⁵

Different cultures also characterize the word “ship” using their own set of criteria. By the Roman law, “[n]avim accipere debemus sive marinam, sive fluviatilem, sive in aliquo stagno naviget sive schedia sit. Dig. de Exercit Act,”¹⁶ which loosely translates as “includ[ing] everything which floated upon the waters and was accessory to commerce.”¹⁷ “Under the [old] French law the definition is almost equally as broad. Says Emerig. Assur. c[hapter] 4, [section] 7, par[agraph] 1: The word ‘ship’ (navire) includes every vessel of timber workable to float and to be carried upon the water.”¹⁸

B. Definitions Of “Vessel” Found In Other Admiralty Statutes

In United States maritime law, different statutes have also identified the term “vessel” in various ways. Some statutes use the term “vessel” without defining it at all, while others use specific terminology or nomenclature familiar in the field.¹⁹ As scholars Grant Gilmore and Charles L. Black, Jr. commented in their treatise, *The Law of Admiralty*,

practically all of the business that comes before the admiralty court directly or indirectly concerns what are indubitably ‘vessels.’ In the dealings of the courts with the structures and objects that have raised the question actively, a single clear test is hard to discern; perhaps the best approximation would be to say that the term ‘vessel’ is applied to floating structures capable of transporting something over the water.²⁰

In the First Circuit case of *DiGiovanni v. T aylor Bros., Inc.*,²¹ the court found at

¹³WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 2547 (1976).

¹⁴BLACK’S LAW DICTIONARY, 1562 (6th ed. 1990).

¹⁵Royal Caribbean Corp., “Contract for Carriage of Passengers,” 1989.

¹⁶A Raft of Cypress Logs, 20 F. Cas. 169, 170 (W.D. Tenn. 1876) (No. 11,527).

¹⁷*Id.*

¹⁸*Id.*

¹⁹See discussion *infra* pp. 4-7.

²⁰GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY*, 33 (2d ed. 1975) (citing *Pleason v. Gulfport Shipping Corp.*, 221 F.2d 621 (5th Cir. 1955)). However difficult it may be to discern the word “vessel,” summary judgment is only appropriate if, “there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c).

²¹959 F.2d 1119 (1st Cir. 1992).

least twenty-four maritime or maritime related statutes with slightly different wordings for the definition of “vessel.”²² Some examples include:

1. The Interstate Commerce Act- “[V]essel means a watercraft or other artificial contrivance that is used, is capable of being used, or is intended to be used, as a means of transportation by water.”²³
2. Whaling Convention Act- “Vessel: The word ‘vessel’ denotes every kind, type, or description of water craft or contrivance subject to the jurisdiction of the United States used, or capable of being used, as a means of transportation.”²⁴
3. The International Navigational Rules Act of 1977- “[V]essel means every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.”²⁵
4. The Anti-Gambling Act- “The term ‘vessel’ includes every kind of water and aircraft or other contrivance used or capable of being used as a means of transportation on water, or on water and in the air, as well as any ship, boat, barge, or other watercraft or any structure capable of floating on the water.”²⁶

²²*Id.* at 1129-30, (Torruella, J., dissenting). *See also* The Contraband Seizure Act, § 1(e), 108 Stat. 1353 (1994) (codified at 49 U.S.C. § 80301(3) (1994)). “‘Vessel’ means a contrivance used, or capable of being used, for transportation in water, but does not include aircraft.” Public Health Service Act, ch. 373, tit. I, § 2, 58 Stat. 682 (1944) (codified at 42 U.S.C. § 201(i) (1994)). “The term ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, exclusive of aircraft and amphibious contrivances.”; The Communications Act of 1934, ch. 652, tit. I, § 3, 48 Stat. 1065 (codified at 47 U.S.C. §153 (w)(1) (1994)). “‘[V]essel’ includes every description of watercraft or other artificial contrivance, except aircraft, used or capable of being used, as a means of transportation on water, whether or not it is actually afloat.”; The Sentencing Reform Act, ch. 645, § 3615, 62 Stat. 840 (1948) (codified at 18 U.S.C. § 3667 (1994)). “As used in this section, ‘vessel’ includes every description of watercraft used, or capable of being used as a means of transportation in water or in water and air.”; Neutrality Act of 1939, ch. 2, § 16, 54 Stat. 12 (codified at 22 U.S.C. § 456(c) (1994)). “The term ‘vessel’ means every description of watercraft and aircraft capable of being used as a means of transportation on, under, or over water.”; The Oil Pollution Act of 1990, tit. I, § 1001, 104 Stat. 486 (codified at 33 U.S.C. § 2701(37) (1994)). “‘[V]essel’ means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel.”; The Federal Ship Mortgage Insurance Act, ch. 858, §§ 905(e), 1101 (1936) (codified at 46 U.S.C. app. § 1271(b) (1994)). “The term ‘vessel’ includes all types, whether in existence or under construction, of passenger cargo and combination passenger-cargo carrying vessels, tankers, tugs, towboats, barges, dredges and ocean thermal energy conversion facilities or plant ships which are or will be documented under the laws of the United States”; The Submarine Cable Act, ch. 17, § 10, 25 Stat. 42 (1888) (codified at 47 U.S.C. § 30 (1994)). “[T]he term vessel shall be taken to mean every description of vessel used in navigation, in whatever way it is propelled”

²³The Interstate Commerce Act, 92 Stat. 1338 (1978) (codified at 49 U.S.C. § 10102(30) (1994)).

²⁴The Whaling Convention Act, ch. 653, § 2, 64 Stat. 421 (1950) (codified at 16 U.S.C. § 916(e) (1994)).

²⁵The International Navigational Rules Act of 1977, § 2, 91 Stat. 308 (codified at 33 U.S.C. § 1601(1) (1994)).

²⁶The Anti-Gambling Act, ch. 139, § 23, 63 Stat. 92 (1949) (codified at U.S.C. § 1081 (1994)).

III. AUTHOR'S ANALYSIS

A. *Historical Perspective*

1. History of the Jones Act

The Jones Act is indicative of other statutes in admiralty law that contain nebulous definitions of the word "vessel." For that reason, it will be helpful in analyzing the Jones Act to gain a better perspective of the larger controversy.

In March 1915, Congress took the first step towards promoting the safety of seamen in the merchant marines by passing the Act of March 4, 1915.²⁷ The complete name of the legislation was, "An Act to Promote the Welfare of American Seaman in the Merchant Marine of the United States; to Abolish Arrest and Imprisonment as a Penalty for Desertion and to Secure the Abrogation of Treaty Provisions in Relation Thereto, and to Promote Safety at Sea."²⁸ The Act, which took up approximately twenty pages in the Statutes at Large, was concerned mostly with matters such as seamen's working conditions and life-saving equipment.²⁹ At the very end, section 20 received little notice,³⁰ but is the one section that contained recovery for injuries suffered onboard a vessel.³¹

The Act included a definition of the word "vessel," which was derived from section 65 of the Act of June 7, 1872, which re-enacted the 1866 United States Revised Statutes, section 4612.³² That definition read in part:

In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seamen'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river to which the provision of this chapter may be applicable³³

Section 20 of the Act of March 4, 1915, was soon amended as part of the Act of June 5, 1920, passed by the Sixty-Sixth Congress.³⁴ The complete name of the 1920

²⁷Act of March 4, 1915, ch. 153, §§ 1-20, 38 Stat. 1164-85.

²⁸*Id.*

²⁹*Id.*

³⁰*See* H.R. REP. NO. 1439, 63D CONG., 3d Sess. 25, 30 (1915), 52 CONG. REC. 4639, 4640 (1915) (noting how Congress treated section 20 of the Act of 1915 with little attention).

³¹Act of March 4, 1915, ch. 153, § 20, 38 Stat. 1185.

³²Act of June 7, 1872, 17 Stat. 277. The complete title of the Act was, "An Act to Authorize the Appointment of Shipping Commissioners by the Several Circuit Courts of the United States, to Superintend the Shipping and Discharge of Seaman Engaged in Merchant Ships Belonging to the United States, and for the Further Protection of Seamen." *Id.*

³³*Id.*

³⁴Act of June 5, 1920, ch. 250, §§ 1-39, 41 Stat. 988-1008 (codified at 46 U.S.C. app. §§ 861-889 (1994)).

Act was “An Act to Provide for the Promotion and Maintenance of the American Merchant Marine, to Repeal Certain Emergency Legislation, and Provide for the Disposition, Regulation, and Use of Property Acquired Thereunder, and for Other Purposes.”³⁵ Section 39, in effect, stated that the entire 1920 Act “may be cited as the Merchant Marine Act of 1920.”³⁶

The Merchant Marine Act of 1920 included the Ship Mortgage Act,³⁷ amended the Maritime Lien Act of 1910,³⁸ and established the United States Shipping Board.³⁹ However, it was section 33, which appeared at the end of statute 1007 under the subtitle of “Miscellaneous Provisions”⁴⁰ that amended section 20 of the Act of 1915. Section 33 was unrelated to the balance of the statute, and became more popularly known as the Jones Act⁴¹ due to the efforts of Senator Wesley L. Jones of Washington state who was Chairman of the Senate Commerce Committee at the time.⁴²

The Merchant Marine Act of 1920 included its own definition of the word “vessel,” which was different than the one used in the Act of March 4, 1915. The Merchant Marine Act borrowed its terminology from the Shipping Act of 1916.⁴³ Section 37 of the Merchant Marine Act,⁴⁴ under the title, “words and terms in act defined,” read: “When used in this act unless the context otherwise requires, the terms . . . vessel . . . shall have the meaning assigned . . . by sections 1 and 2 of the Shipping Act, 1916, as amended by this Act.”

The definition of “vessel” found in the Shipping Act of 1916⁴⁵ read, “[a]ll watercraft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or intended to be used as a means of transportation on water.”⁴⁶

But, since “lawmakers amended section 20 of the Act of 1915 by substituting

³⁵*Id.*

³⁶*Id.*; § 39, 41 Stat. 1008 (codified at 46 U.S.C. § 889 (1994)).

³⁷*Id.*; § 30, 41 Stat. 988, 1000-05 (codified at 46 U.S.C. §§ 911-916 (1994)).

³⁸*Id.*; § 30, 41 Stat. 988, 1005-06 (codified as amended at 46 U.S.C. app. §§ 971-975 (1994)).

³⁹*Id.*; § 3, 41 Stat. 988, 989-990.

⁴⁰Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007.

⁴¹*Id.* (codified at 46 U.S.C. app. § 688 (1994)).

⁴²*See* 59 CONG. REC. 8170 (1920). It was introduced by Senator Jones on February 6, 1920 as the last section of S. Res. 3876, 66th CONG., 2d Sess. § 3 (1920), and was added by the Senate Commerce Committee to H.R. 10,378, 66th CONG., 1st. Sess. (1919). S. Rep. No. 573, 66th CONG., 2d Sess. 23.

⁴³Act of September 7, 1916, ch. 451, §§ 1-44, 39 Stat. 728, as amended by the Act of July 15, 1918, ch. 152, §1-4, 40 Stat. 900-903 (codified at 46 U.S.C. app. §§ 801-842 (1994)).

⁴⁴Act of June 5, 1920, ch. 250, § 37.

⁴⁵*Id.*; § 44 (codified at 46 U.S.C. app. § 842 (1994)). “This chapter may be cited as ‘Shipping Act, 1916.’” *Id.*

⁴⁶*Id.*

section 33 of the [Merchant Marine] Act of 1920,”⁴⁷ neither the definition of “vessel” appearing in the Act of March 4, 1915, nor the definition contained in section 37 of the Act of June 5, were found in Section 33 of the Act of June 5, 1920 (the Jones Act).⁴⁸ In fact, the Jones Act contained no definition of the word “vessel,”⁴⁹ therein, creating the problem.

2. First, There Must be a Seaman

As just discussed, the Jones Act does not reference the word vessel.⁵⁰ It only alludes to seamen. The Jones Act reads in part:

§ 688. Recovery for injury to or death of seaman

Any seamen who shall suffer injury in the course of his employment, may at his election, maintain an action for damages at law, with the right to trial by jury . . . and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury⁵¹

Predictably, claims by seamen injured in the course of their employment covers a large number of all admiralty cases that come before the court. “A careful examination of docket statistics in the United States District Court for the Eastern District of Louisiana [from 1977-1986] indicates that approximately one-fourth of the civil actions filed in that busy court . . . were ‘personal injury--Jones Act cases.’”⁵²

Prior to the Jones Act, there was no remedy in negligence for a seaman to sue his employer,⁵³ but “with the passage of the Jones Act . . . Congress secured for seaman certain legal advantages when injured.”⁵⁴ “As Justice Story explained, [since] seaman ‘are emphatically the wards of the admiralty’ they ‘are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour,’”⁵⁵ and as such, should be provided benefits under the law.

It may be stating the obvious, but to be a seaman, one must have something to do with the sea or water. Of course, a seaman does not actually have to work on the sea, or be a man. A woman could make a Jones Act claim, and she could be employed on a riverboat casino floating on the Mississippi River, miles from the nearest sea.⁵⁶

⁴⁷Warner v. Goltra, 293 U.S. 155, 159 (1934).

⁴⁸Compare Act of March 4, 1915, ch. 153, § 20 with Act of June 5, 1920, ch. 250, §§ 33 & 37.

⁴⁹Act of June 5, 1920, ch. 250, § 33.

⁵⁰46 U.S.C. § 688 (1994).

⁵¹§ 688(a).

⁵²Peter Beer, *Keeping Up With the Jones Act*, 61 TUL. L. REV. 379, 400 (1986) (compiling based on a review by the author, Beer, of the Clerk’s Office Records).

⁵³Foult v. Donjon Marine Co., 961 F. Supp. 692, 695 (D.N.J. 1997).

⁵⁴*Id.*

⁵⁵*Id.* (quoting Harden v. Gordon, 11 F. Cas. 480, 485, 483 (C.C.D. Me. 1823) (No. 6,047)).

⁵⁶See generally Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560 (5th Cir. 1995) (concerning recovery under the Jones Act for severe injuries to plaintiff’s knee, which

"In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea."⁵⁷ But, the presence of some type of "structure" is a necessary ingredient since swimmers do not qualify under the Jones Act.⁵⁸

Usually, in defining statutory terminology, "[t]he most persuasive evidence of . . . [congressional] intent [are] the words selected by Congress."⁵⁹ But, Congress failed to define the term seaman in the Jones Act.⁶⁰ However, the Supreme Court in *McDermott International, Inc. v. Wilander*⁶¹ stated that, "'seamen' is a maritime term of art. In the absence of contrary indication, we assume that when a statute uses such a term, Congress intended it to have its established meaning . . . under the general maritime law when Congress passed the Jones Act."⁶²

Therefore, it must be determined how the term "seaman" was used in 1920, the time the Jones Act was passed. The traditional definition of a seaman at that period was one who could "hand-reef and steer."⁶³ In the 1916 case of *The Buena Ventura*,⁶⁴ Judge Hough pointed out "that every one is entitled to the privilege of a seaman who, like seamen, at all times contribute to and labor about the operation and welfare of the ship . . ."⁶⁵ And as one court later said, "The Jones Act . . . speaks only of seaman, but courts have naturally spoken of seaman in terms of ships, vessels, and voyages."⁶⁶ So, in short, "For there to be a seaman, there must first be a ship."⁶⁷

Therefore, a seaman must have some kind of relationship to a vessel or ship, although the specific nature of that connection is outside the scope of this article.⁶⁸

she claims occurred by tripping over a garbage can lid while working as a cocktail waitress aboard a floating dockside casino).

⁵⁷Warner v. Goltra, 293 U.S. 155, 157 (1934).

⁵⁸See Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260, 1261 (9th Cir. 1993) (holding that an action for injuries suffered by a fifteen year old boy, who dove off the deck of a houseboat into the river and was rendered quadriplegic, bore no relationship to traditional concepts of maritime activity). This was not a Jones Act claim, but there was no admiralty jurisdiction anyway.

⁵⁹Director, Office of Workers' Compensation Programs v. Forsyth Energy, Inc., 666 F.2d 1104, 1107 (7th Cir. 1981) (noting the court's function in interpreting a statute).

⁶⁰46 U.S.C. app. § 688 (1994).

⁶¹498 U.S. 337 (1991).

⁶²*Id.* at 342.

⁶³The Ole Oleson, 20 F. 384, 384 (E.D. Wisc. 1884).

⁶⁴243 F. 797 (S.D.N.Y. 1916).

⁶⁵*Id.* at 799.

⁶⁶DiGiovanni v. Traylor Bros., Co., 959 F.2d 1119, 1121 (1st Cir. 1992).

⁶⁷Williams v. Avondale Shipyards, Inc., 452 F.2d 955, 958 (5th Cir. 1971).

⁶⁸The Supreme Court set the parameters for the term "seaman" in their 1991 landmark decision, *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). Wilander was a paint foreman who was injured while assigned to a "paint boat" chartered by McDermott International. His duties consisted of supervising, sandblasting, and painting oil drilling platforms in the Persian Gulf. His injury resulted from a plug blowing out under pressure and

The question remains, however, “what is a vessel?”

3. In Navigation

Under the Jones Act, for a structure to be considered a vessel, it must be “in navigation”⁶⁹ even though the phrase does not appear anywhere in the Act itself. As one court said, the term is just another one of the Act’s “several unexplained definitions.”⁷⁰ In fact, the term does not appear in any of the statutes amended by, or incorporated into, the Merchant Marine Act of 1920, of which the Jones Act was part.⁷¹ Nevertheless, many students, scholars, academicians, and even judges continue to cite to the Jones Act’s “vessel in navigation” requirement in treatises, textbooks, and articles.

The term “vessel in navigation” is actually derived from the 1941 case of *Carumbo v. Cape Cod S.S. Co.*⁷² The *Carumbo* court held that, “[o]ne cannot be a ‘member of a crew’ if the ship is not in navigation.”⁷³ Although the Jones Act speaks only of seaman,⁷⁴ many courts like the district court in *Carumbo* substituted the word seaman for the commonly used term, “member of the crew.” “Indeed, the two were often used interchangeably in general maritime cases.”⁷⁵ In fact, there have been hundreds of cases comparing the duties of a “seaman” and those of a “member of the crew.”⁷⁶ But, for our purposes of defining “vessel,” a seaman is the broader

striking him in the face while he was inspecting a pipe. *Id.* The Court held that Wilander could not be precluded from seaman status because he did not perform a transportation-related function on board or aid in the navigation of a vessel. *Id.* at 356. In *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138 (9th Cir. 1995), the court developed a two part analysis for identifying the relationship of a seaman to a vessel; (1) the seaman had to have a “more or less permanent connection” with the vessel, and (2) a seaman’s job must contribute to the function or mission of the vessel. *Id.* at 1141. In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Supreme Court slightly altered the two element test, and stated; (1) the worker’s duties must contribute to the function of the vessel or to the accomplishment of its mission, and (2) the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in both its duration and nature. *Id.* at 353. In the 1997 case of *Harbor Tug and Barge Co. v. Papai*, 117 S. Ct. 1535 (1997), the Supreme Court once again revisited the issue, and declared that “for the substantial connection requirement to serve its purpose, the nature of the inquiry into the employee’s connection to the vessel must concentrate on whether the employee’s duties take him to sea.” *Id.* at 1540.

⁶⁹See *Harbor Tug and Barge Co. v. Papai*, 117 S. Ct. 1535, 1538 (1997) (holding that a worker may establish seaman status based on his connection to an identifiable group of vessels in navigation).

⁷⁰*Johnson v. Beasley Constr. Co.*, 742 F.2d 1054, 1058 (7th Cir. 1984).

⁷¹See Act of March 4, 1915, ch. 153, §§ 1-20; Act of September 7, 1916, ch. 451, §§ 1-44; Act of July 15, 1918, ch. 152, §§ 1-4.

⁷²123 F.2d 991 (1941).

⁷³*Id.* at 995.

⁷⁴46 U.S.C. § 688 (1994).

⁷⁵*McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 348 (1991).

⁷⁶See generally *Swanson v. Marra Bros.*, 328 U.S. 1 (1946).

term that includes “member of a crew.”⁷⁷

Those magic words, “in navigation,” ushered in a whole new era for the determination of “what is a vessel?” under the Jones Act. It set forth a beginning for the current line of decisions requiring a seaman to have a connection to a “vessel in navigation.”⁷⁸ The term is still in use today.⁷⁹

A “‘vessel’ [in navigation] is one that is capable of use as a vessel even if not functioning as such at the moment in question.”⁸⁰ “As properly construed, the ‘in navigation’ requirement is used in its broad sense, and is not confined strictly to actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of commerce or transportation on navigable waters.”⁸¹ “Case law indicates that a vessel is ‘in navigation’ although moored to a pier, in a repair yard for periodic repairs, or while temporarily attached to some object.”⁸²

The court in *Johnson v. Oil Transport Co.*⁸³ noted:

[N]o precise common test for determining when a vessel is in navigation underlies the various decisions on the subject. ‘It is impossible to define the phrase (‘in navigation’), in general terms; the words are colloquial and their fringe will always be somewhat ragged. Perhaps the best hope is that, as the successive variants appear, they will finally serve rudely to fix the borders.’⁸⁴

Vessels may be categorized into three groups in order to further isolate the “in navigation” requirement: (1) vessels under construction, (2) stationary vessels, or vessels undergoing short term repairs, and (3) vessels permanently removed from service. Only those vessels in the second category qualify as being “in navigation.”

“Historically, ship construction is not regarded as a traditional maritime activity; a ship under construction has not evolved into vessel status.”⁸⁵ In *Tucker v. Alexandroff*,⁸⁶ the court eloquently said:

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron--an ordinary piece of personal property--as distinctly a land structure

⁷⁷*Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 994 (1st Cir. 1941).

⁷⁸*Wilander*, 498 U.S. at 354.

⁷⁹*See Harbor Tug and Barge Co. v. Papai*, 117 S. Ct. 1535, 1540 (1997) (stating there was no dispute that the plaintiff worked aboard a “vessel in navigation”); *Gipson v. Kajima Eng’g and Constr., Inc.*, 972 F. Supp. 537, 542 (C.D. Cal. 1997) (holding that barge YFN-946 was not a “vessel in navigation” under the Jones Act).

⁸⁰*Farrell Ocean Servs., Inc. v. United States*, 681 F.2d 91, 93 (1st Cir. 1982).

⁸¹*Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3d Cir. 1975).

⁸²*Id.*

⁸³440 F.2d 109 (5th Cir. 1971).

⁸⁴*Id.* at 115 (quoting *Hawn v. American S.S.Co.*, 107 F.2d 999, 1000 (2d Cir. 1939)).

⁸⁵*Orgeron v. Avondale Shipyards, Inc.*, 561 So. 2d 38, 42 (La. 1990).

⁸⁶183 U.S. 424 (1902).

as a house In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction.⁸⁷

Even “a launched but uncompleted vessel floating or maneuvering in navigable waters . . . is not yet an instrumentality of commerce- private or public- and is therefore not ‘in navigation.’”⁸⁸

In addition, “a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside.”⁸⁹ “[A] vessel which temporarily leaves commerce, enters a shipyard for minor repairs, and thereupon returns to commerce remains in navigation”⁹⁰

In determining the status of a vessel in repair, the Supreme Court in *West v. United States*⁹¹ stated, “the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each . . . workman is doing”⁹² The court in *Waganer v. Sea-Land Service, Inc.*,⁹³ restated the *West* repair requirements and noted, “the ship in question must have been in navigational status, and not ‘dead,’ which in turn depends upon whether the contracted work is minor or major, and who has custody and control of the ship while the work is being done.”⁹⁴ “If the owner [has] taken control of [the] ship from the contractor at that point, this would be some evidence that the ship was in navigation after being taken out of navigation.”⁹⁵

The court in *Warwick v. Huthnance Division, Grace Offshore Co.*⁹⁶ synthesized some of the earlier cases,⁹⁷ and developed six factors for use in determining whether a vessel has been removed from navigation:

- (1) The nature of the repairs being performed on the vessel; (2) The duration of these repairs; (3) The cost of those repairs in comparison to the value of the vessel; (4) Whether the owner of the vessel has relinquished control of the repairs to a third party; (5) The length of time in which the vessel was laid up or stacked; (6) Whether the repair work was typical of work performed primarily by shore-based employees.⁹⁸

⁸⁷*Id.* at 438.

⁸⁸*Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971).

⁸⁹*DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1121 (1st Cir. 1992).

⁹⁰*Delome v. Union Barge Line Co.*, 444 F.2d 225, 232 (5th Cir. 1971).

⁹¹361 U.S. 118 (1959).

⁹²*Id.* at 122.

⁹³486 F.2d 955 (5th Cir. 1973).

⁹⁴*Id.* at 958.

⁹⁵*McKinley v. All Alaskan Seafood, Inc.*, 980 F.2d 567, 571 (9th Cir. 1992).

⁹⁶760 F. Supp. 571 (W.D. La. 1991).

⁹⁷*See Abshire v. Sea Coast Products, Inc.*, 668 F.2d 832 (5th Cir. 1982); *Rodgers v. United States*, 452 F.2d 1149 (5th Cir. 1972).

⁹⁸*Warwick v. Huthnance Div., Grace Offshore Co.*, 760 F. Supp. 571, 573 (W.D. 1991).

“At some point, however, repairs become sufficiently significant that the vessel can no longer be considered in navigation.”⁹⁹ “Major overhaul or refitting of a vessel will take the vessel out of navigation.”¹⁰⁰ “It is equally apparent that conversion of the vessel from one use to another would also take the ship out of navigation, if the change required extensive work.”¹⁰¹

In one of the more interesting cases, Donald McClendon, who was acting as a caretaker on a towboat, attempted to produce gold by cooking mercury inside of a potato using the ship’s oven.¹⁰² The ship “was in dry-dock for numerous repairs and in dire need of a new bottom. Not surprisingly, McClendon sustained injuries from breathing mercury vapors,”¹⁰³ and made a claim under the Jones Act because he was on a vessel in navigation.¹⁰⁴ The court found that reasonable persons could not conclude that the vessel was in navigation since the ship had no captain or crew, no power of her own, and was “undergoing extensive repairs by contract workers which would eventually take seventy-seven days to complete and over \$25 million to pay for.”¹⁰⁵

If a vessel has changed its function, it may lose its navigation ability, and consequently lose its vessel status.¹⁰⁶ “In *Gonzales v. United States Shipping Board Emergency Fleet Corp.*, it was held that a ship is not in navigation if there is no present hope or intention of having her go to sea and if it would take a long time to put her in shape for an ocean voyage.”¹⁰⁷

As Judge Hale eloquently stated, in the case of *Bishop v. Alaska S. S. Co.*,¹⁰⁸ when he described a vessel taken permanently out of navigation:

There was a tang of salt air and movement of wind and wave about the S.S. Fortuna as she lay on the blocks in floating dry dock, and perhaps gulls perched on her railings or soared above her stacks, and to everyone who looked upon her she seemed a ship of the sea.¹⁰⁹

Circuit Judge Timbers also expressed similar sentiments in the case of the

⁹⁹*Chandris, Inc. v. Latsis*, 515 U.S. 347, 374 (1991).

¹⁰⁰*McKinley*, 980 F.2d at 570.

¹⁰¹*Id.*

¹⁰²*McClendon v. OMI Offshore Marine Serv.*, 807 F. Supp. 1266, 1267 (E.D. Tex. 1992).

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*See Ross v. Moak*, 388 F. Supp. 461 (M.D. La. 1975) (holding that a vessel which had been turned into a bookstore was no longer in navigation).

¹⁰⁷*New England Fish Co. v. Barge or Vessel, Sonya*, 332 F. Supp. 463, 468 (D. Alaska 1971) (citing *Gonzales v. U.S. Board of Shipping Emer. Fleet Corp.*, 3 F.2d 168 (E.D.N.Y. 1924)).

¹⁰⁸404 P.2d 990 (Wash. 1965).

¹⁰⁹*Id.* at 991.

McCarthy v. The Bark Peking,¹¹⁰ in which the Bark Peking was retired and turned into a floating museum. “The Peking would like nothing more than to slip its moorings, ease into the harbor and head for the open seas, with the seagulls in its wake. Sadly, it is fated not to do so.”¹¹¹

In the case of *Boyd v. Ford Motor Co.*,¹¹² the court of appeals identified several factors discussed by the district court in their determination that a vessel was taken permanently out of service:

- (1) the ship was not sailing and in fact secured with special ‘winter-lines’;
- (2) the full crew was not stationed aboard the ship; (3) the vessel’s main engine had been completely ‘torn down’ and was not in operable condition; and (4) the vessel had lost her classification with the U.S. Coast Guard, and could not regain it without an inspection.¹¹³

B. Analysis

In terms of the Jones Act, some courts¹¹⁴ make reference to a “vessel” using language from the Supreme Court’s 1903 opinion in *The Robert W. Parsons*,¹¹⁵ although that case was decided long before the Jones Act.¹¹⁶ In 1973, the Fifth Circuit case of *Cook v. Belden Concrete Products, Inc.*,¹¹⁷ updated the language of *The Robert W. Parsons* with their own version of what constitutes a vessel,¹¹⁸ and

¹¹⁰676 F.2d 42 (2d Cir. 1982).

¹¹¹*Id.* at 44.

¹¹²948 F.2d 283 (6th Cir. 1991).

¹¹³*Id.* at 286.

¹¹⁴Admiralty claims are generally heard by a judge, not a jury. Federal Rule of Civil Procedure 38, “Jury Trial of Right”, states, “[a]dmiralty and [m]aritime [c]laims . . . shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).” FED. R. CIV. P. § 38(e). However, under the Jones Act, a seaman is entitled to a jury trial. 46 U.S.C. app. § 688 (1994). *See also* Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) (holding that a seaman who joined in a single complaint, a maintenance and cure claim and a Jones Act claim, both arising out of one set of facts, was entitled to a jury trial). A seaman may also sue in state court, but that action cannot be removed to federal court. *Id.* (See Pate v. Standard Dredging Corp, 193 F.2d 498 (5th Cir. 1952); Lackey v. Atlantic Richfield Co., 990 F.2d 202, 207 (5th Cir. 1993) (holding that state court suits based on Jones Act claims are not removable). The Jones Act incorporates the anti-removal provisions from the Federal Employers’ Liability Act (FELA), ch. 149, §§ 1-10, 35 Stat. 65 (1908) (codified at 45 U.S.C. §§ 51-60 (1994)) as decided by the Supreme Court in the case of Panama R Co. v. Johnson, 264 U.S. 375 (1924)).

¹¹⁵191 U.S. 17, 30 (1903). “In fact, neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged.” *Id.*

¹¹⁶*See* Smith v. Texaco Inc., 524 F. Supp. 1313, 1314 (E.D. La. 1981) (discussing the test for vessel status).

¹¹⁷472 F.2d 999 (5th Cir. 1973).

¹¹⁸*Id.* at 1001. A vessel is one which is designed or used primarily “for the transportation of passengers, cargo, or equipment from place to place across navigable waters.” *Id.* at 1002.

many courts have adopted that terminology in one form or another.¹¹⁹ Still other courts make use of the general maritime definition of vessel found in Title I of the United States Code,¹²⁰ the text of which, was originally conceived in the Act of 1866. That definition was expanded upon by the Supreme Court in their 1887 decision in *Cope v. Vallette Dry-Dock Co.*¹²¹ Finally, to further muddy the waters, the 1941 district court's holding in *Carumbo v. Cape Cod S.S. Co.*¹²² stated that a Jones Act vessel had to be "in navigation."¹²³

As a result, courts have inconsistently interpreted the meaning of the word "vessel" using some or all of the elements of *Cope v. Vallette Dry-Dock Co.*, *The Robert W. Parsons*, *Cook v. Belden Concrete Products, Inc.*, the United States Code, and *Cape Cod S.S. Co.* For example, in the case of *Salgado v. M.J. Rudolph Corp.*,¹²⁴ "the court held that a floatable crane was a vessel for purposes of an action for breach of warranty of seaworthiness without even deciding whether it was a 'vessel in navigation' for purposes of the Jones Act."¹²⁵ Similarly, the court in *McSweeney v. M.J. Rudolph Corp.*,¹²⁶ also declined to decide whether the same floatable crane was a "vessel in navigation" for purposes of the Jones Act.¹²⁷

1. The United States Code Definition

Some admiralty statutes, which do not contain a definition of the word "vessel," rely on the United States Code's definition as authority.¹²⁸ Title 1, "General Provisions", Section 3 of the United States Code states, "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."¹²⁹ In one of the most famous quotes in admiralty jurisprudence, Judge Brown of the Fifth Circuit thought the Code term was so vague, he sarcastically noted, "[n]o doubt the three men in a tub would also fit within our definition of 'vessel', and one probably could make a convincing

¹¹⁹See *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 33 (2d Cir. 1996); *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 647 (1st Cir. 1973); *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984).

¹²⁰"The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3 (1994).

¹²¹119 U.S. 625 (1887).

¹²²123 F.2d 991 (1st Cir. 1941).

¹²³*Id.* at 995.

¹²⁴514 F.2d 750 (2d Cir. 1975).

¹²⁵*Buccellato v. City of New York*, 808 F. Supp. 967, 973 (E.D.N.Y. 1992) (citing *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975)).

¹²⁶575 F. Supp. 746 (E.D.N.Y. 1983).

¹²⁷*Buccellato*, 808 F. Supp. at 973 (citing *McSweeney v. M.J. Rudolph Corp.*, 575 F. Supp. 746 (E.D.N.Y. (1983)).

¹²⁸See discussion *infra*.

¹²⁹1 U.S.C. § 3 (1994).

case for Jonah inside the whale.”¹³⁰

The Code definition of vessel originally comes from an Act passed by Congress in 1866 for the prevention of smuggling.¹³¹ The definition then appeared in the Revised Statutes of 1873¹³² before the United States Code was constituted by the Act of 1947.¹³³ It is presented in Title 1 of the Code under “Chapter 1.--Rules of Construction,”¹³⁴ “thus indicating that it was enacted as a rule for the construction of the federal statutes generally.”¹³⁵

In the 1887 case of *Cope v. Vallette Dry-Dock Co.*,¹³⁶ the Supreme Court first addressed the definition of the word “vessel” found in the 1873 Revised Statutes (and later the U.S. Code). In that case, the plaintiffs argued that their floating dry-dock was “a large floating vessel and water-craft and artificial contrivance, used and capable of being used as a means of transportation in water . . .”¹³⁷ The Court held that, “[a] fixed structure, such as this dry-dock is, not used for the purpose of navigation The fact that it floats on the water does not make it a ship or vessel”¹³⁸ The Court also noted the words of Lord Justice Brett, an English court of appeals judge who said that a vessel is something “built in a particular form and used for a particular purpose.”¹³⁹ In effect, the Court required that a structure needs to do more than just float, and that one should look to the particular purpose for which it was built before determining its status as a vessel.

Mr. Justice Brown, in the 1903 Supreme Court case of *The Robert W. Parsons*,¹⁴⁰ took the words of his predecessors in *Cope* one step further by stating, “[i]n fact, neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged.”¹⁴¹ Justice Brown seemingly ignored the terminology found in the Revised Statutes, and instead borrowed language from earlier court decisions, including *The General Cass*¹⁴² in 1871. In that case, the court stated, “[t]he true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, is the business or employment for which it is intended, or is susceptible of being used, or in which it

¹³⁰Burks v. American River Transp. Co., 679 F.2d 69, 75 (5th Cir. 1982).

¹³¹Act of July 18, 1866, ch. 201, § 1, 14 Stat. 178.

¹³²1 Rev. St. U.S. § 3 (1873)

¹³³Act of July 30, 1947, ch. 388, 61 Stat. 633.

¹³⁴1 U.S.C. § 3 (1994).

¹³⁵Lambros Seaplane Base v. the Batory, 215 F.2d 228, 232 (2d Cir. 1954).

¹³⁶119 U.S. 625 (1887).

¹³⁷*Id.* at 626.

¹³⁸*Id.* at 627.

¹³⁹*Id.* at 629.

¹⁴⁰191 U.S. 17 (1903).

¹⁴¹*Id.* at 30.

¹⁴²10 F. Cas. 169 (E.D. Mich. 1871) (No. 5,307).

is actually engaged, rather than its size, form, capacity, or means of propulsion.”¹⁴³

In the 1944 case of *Norton v. Warner Co.*,¹⁴⁴ the Supreme Court once again revisited the general maritime definition of vessel when they determined that a barge was a vessel for purposes of resolving an injury claim under the Jones Act.¹⁴⁵ Thus, on some occasions the court chooses to make use of the general maritime definition of the word “vessel,” and at other times they choose not to. This remains the case today.¹⁴⁶

2. Comparison to the Longshore Harbor Workers’ Compensation Act

A comparison of the Jones Act to the Longshore Harbor Workers’ Compensation Act (LHWCA) is a useful analysis because like the Jones Act, the LHWCA does not contain a definition of the word “vessel.”¹⁴⁷ However, most courts interpreting the LHWCA have adopted the general maritime definition of “vessel” found in the United States Code.¹⁴⁸ This leads to an inference that maybe the same theory of “adoption” could be made for the Jones Act use of the Code definition.

The Longshoremen’s and Harbor Workers’ Compensation Act (LHWCA) of 1927 was remedial legislation intended to provide a remedy to workers injured during longshoring activities.¹⁴⁹ In reference to a “vessel,” the LHWCA stated:

the term ‘vessel’ means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel’s owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer, master, officer, or crew member.¹⁵⁰

“Obviously this definition does not provide precise guidance as to what is included within the term ‘vessel.’ The legislative history similarly is not helpful.”¹⁵¹

Before enactment of the LHWCA, longshoremen were not covered by admiralty remedies, and could not seek relief through state compensation systems.¹⁵² The

¹⁴³*Id.* at 170 (citing *The Kate Tremaine*, 14 F. Cas. 144 (E.D.N.Y. 1871) (No. 7,622)).

¹⁴⁴321 U.S. 565 (1944).

¹⁴⁵*Id.* at 571-72.

¹⁴⁶*See* *Smith v. Texaco, Inc.*, 524 F. Supp. 1313, 1314 (E.D. La. 1991) (referencing use of the general maritime definition).

¹⁴⁷Longshore and Harbor Workers’ Compensation Act (LHWCA), ch. 509, §§ 1-50, 44 Stat. 1424-46 (1927) (codified as amended at 33 U.S.C. §§ 901-950 (1994)).

The 1984 Amendment to the Act substituted “Longshore” for “Longshoremen’s”, although the Act is frequently mis-cited using its former name. Pub. L. 98-426, § 27(d)(1), 98 Stat. 1654.

¹⁴⁸*Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 662 (9th Cir. 1992).

¹⁴⁹33 U.S.C. §§ 901-50 (1994).

¹⁵⁰*Id.* § 902(21) (1994).

¹⁵¹*McCarthy v. The Bark Peking*, 716 F.2d 130, 133 (2d Cir. 1983).

¹⁵²*Merrill v. Chicago & Illinois Midland Ry.*, 751 F. Supp. 770, 775 (C.D. Ill. 1990) (referencing the LHWCA, ch. 509, § 2(3), 44 Stat. 1426 (1927) (codified as amended at 33

LHWCA proceeded to cover workers injured or killed only on navigable waters or certain adjoining areas of land.¹⁵³ This rigid “situs” requirement quickly created inconsistent results because “it allowed workers, during their normal work day, to walk in and out of LHWCA coverage as they moved to and from dry land.”¹⁵⁴ In *Nacirema Operating Co. v. Johnson*,¹⁵⁵ and the related case of *Marine Stevedoring Corp. v. Oosting*,¹⁵⁶ “four workers were injured or killed when a crane knocked them from their workplace. One worker drowned, and because his body fell into the water he was covered by the LHWCA; conversely the other three fell onto a pier or were crushed against a railroad car,” but the court denied LHWCA coverage to these men because they were hurt on land.¹⁵⁷

In response to these types of cases, Congress amended the LHWCA in 1972 by broadening the “situs” requirement to allow recovery for “an injury occurring upon the navigable waters of the United States *including* any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel” (emphasis added).¹⁵⁸ Unfortunately, in terms of the word “vessel,” this amendment added only a “circular definition”¹⁵⁹ to the statute.

Since the LHWCA itself does not provide a definition of the word “vessel,” most courts have applied the general maritime definition found in the United States Code.¹⁶⁰ In fact, “[s]ome courts have stated that [the United States Code definition], as a matter of law, provides the LHWCA ‘vessel’ definition.”¹⁶¹ As the court noted in *McCarthy v. The Bark Peking*,¹⁶² “[s]ince Congress, in its use of the term ‘vessel’ in sections 902(21) and 905(b) [of the LHWCA], did not provide a definition different from the generally acknowledged one found in section 3 [of title 1 of the United States Code], we may presume, as other courts have, that it intended to adopt this commonly-used term.”¹⁶³

An argument can be made, therefore, that since the first proviso of the Jones Act also does not mention the word vessel,¹⁶⁴ the Act should simply adopt the general maritime definition, much as the LHWCA has done. The court in *Bollinger Quick*

U.S.C. § 903(a) (1994)).

¹⁵³P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 70 (1979).

¹⁵⁴*Merrill*, 751 F. Supp. at 775.

¹⁵⁵396 U.S. 212 (1969).

¹⁵⁶238 F. Supp. 78 (E.D. Va. 1965).

¹⁵⁷*Merrill*, 751 F. Supp. at 775.

¹⁵⁸33 U.S.C. § 903(a) (1994). The 1972 Amendment to the LHWCA was Pub. L. No. 92-576, § 1, 86 Stat. 1251.

¹⁵⁹*McCarthy*, 716 F.2d at 133.

¹⁶⁰*DiGiovanni v. Traylor Bros., Inc.*, 830 F. Supp. 106, 108 (D.R.I. 1993).

¹⁶¹*Id.*

¹⁶²716 F.2d 130 (2d Cir. 1983).

¹⁶³*Id.* at 134.

¹⁶⁴*See* 46 U.S.C. § 688(a) (1994).

*Repair, Inc. v. M/V Goliath*¹⁶⁵ commented, “[t]he general definition of ‘vessel’ set out by Congress [in the United States Code] . . . applies to every federal statute, unless that statute itself prescribes another definition.”¹⁶⁶

Other courts have also stated that the general maritime definition of “vessel” is applicable for interpreting Jones Act claims. “[Although] there is a slightly different inquiry in a Jones Act case as distinguished from a LHWCA case [“[a] Jones Act seaman must have a more or less permanent attachment to a vessel or fleet of vessels, while recovery under . . . the LHWCA can be based upon transitory contact with a vessel.”¹⁶⁷], [it] is a distinction without significance . . . since . . . these additional elements do not render useless Jones Act cases addressing the ‘vessel’ issue.”¹⁶⁸

The court in *Lash v. Ballard Construction, Co.*¹⁶⁹ further explained, “The ‘vessel’ issue is a jurisdictional issue whether the matter is being considered in the context of the Jones Act or the LHWCA, and the additional elements that must be demonstrated in a Jones Act case are easily separated from the analysis.”¹⁷⁰ Benedict on Admiralty also suggested their meanings were to be construed the same,

While one may not ascribe to the Congress an intent to restate maritime law when it enacted a definition for the construction of statutes generally, it is highly unlikely that Congress, in formulating a definition of a word of so immediate a connection with maritime law and so likely to recur in maritime legislation, could have intended materially to depart from the meaning under general maritime law.¹⁷¹

Further support for using the general maritime definition in determining Jones Act claims is evidenced by the similarity of language relating to both statutes. The general maritime definition is very similar to the terminology used in the Shipping Acts of 1916 and 1918,¹⁷² which was later incorporated into the Merchant Marine Act of 1920,¹⁷³ of which the Jones Act was part.¹⁷⁴ In fact, except for a few choice words, (i.e. stocks), the definition is almost identical. The Supreme Court stated in *Warner v. Goltra*,¹⁷⁵ “[t]he purpose of the lawmakers, clear enough, we believe, upon the surface of the act, takes on an added clearness when the act is viewed in the

¹⁶⁵965 F. Supp. 1448 (D. Or. 1997).

¹⁶⁶*Id.* at 1455.

¹⁶⁷*Orgeron v. Avondale Shipyards, Inc.*, 561 So. 2d 38, 41 (La. 1990).

¹⁶⁸*Lash v. Ballard Constr. Co.*, 707 F. Supp. 461, 463 (W.D. Wash. 1989).

¹⁶⁹707 F. Supp. 461 (W.D. Wash. 1989).

¹⁷⁰*Id.* at 463.

¹⁷¹1 STEPHEN F. FRIEDEL, BENEDICT ON ADMIRALTY, § 165, at 10-11 (7th ed. rev. 1997).

¹⁷²*Compare* Act of September 7, 1916, ch. 451, §§ 1-44, *with* 1 U.S.C. § 3 (1994).

¹⁷³Act of June 5, 1920, ch. 250, § 37.

¹⁷⁴*Id.* at § 33.

¹⁷⁵293 U.S. 155 (1934).

setting of its history.”¹⁷⁶ “We cannot believe that in this process of amendment the word[s] . . . lost the broad meaning that it had in the law to be amended”¹⁷⁷ Arguably then, the language of the U.S. Code could be applicable to Jones Act cases.¹⁷⁸

In a final comparison, the Jones Act term, “in navigation,” has taken on a meaning virtually identical to the “capability” requirement identified in the general maritime jurisdiction. The latter definition states that a vessel is one that is “used, or capable of being used, as a means of transportation on water.”¹⁷⁹ In fact, the Fifth Circuit in *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*¹⁸⁰ held that in order for a longshoreman to make a claim under the LHWCA, the structure must first qualify as a Jones Act vessel.¹⁸¹

Some courts, however, disagree with the use of the general maritime definition as a means of interpreting the Jones Act. The Fifth Circuit explained in *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*,¹⁸² “we are not convinced that the term ‘vessel’ for Jones Act purposes, which is subject to liberal construction consistent with the purposes of the Act, is necessarily a vessel for other purposes as well.”¹⁸³ The court in *Mark Morehead v. Atkinson-Kiewit*,¹⁸⁴ remarked that the definition of vessel under the LHWCA (the general maritime definition) “is more inclusive than that used for evaluating seaman status under the Jones Act.”¹⁸⁵ The court in *McCarthy v. The Bark Peking*¹⁸⁶ also observed, “[i]n contrast, cases decided under the Jones Act . . . have looked to a different test [other than the 1 U.S.C. § 3 definition], in determining what is a vessel for Jones Act purposes.”¹⁸⁷

In general, there does not appear to be much consensus for using the U.S. Code definition of the word vessel in deciding Jones Act claims. However, its mention in some recent cases indicates that it is still a factor that the court considers in making their determination of a vessel’s status.

3. Resolution

It quickly becomes apparent how much confusion has arisen over the seemingly

¹⁷⁶*Id.* at 159.

¹⁷⁷*Id.*

¹⁷⁸*Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 647 (1st Cir. 1973).

¹⁷⁹1 U.S.C. § 3 (1994).

¹⁸⁰*Ducrepont v. Baton Rouge Marine Enters., Inc.*, 877 F.2d 393 (5th Cir. 1989).

¹⁸¹*Id.* at 395-96; *see also* *Holifield v. Great Lake Dredge & Dock, Co.*, CIV.A.92-1935, 1993 WL 370831, at *1 (E.D. La. Sept. 15, 1993) (comparing vessels under the Jones Act and the LHWCA).

¹⁸²644 F.2d 1132 (5th Cir. 1981).

¹⁸³*Id.* at 1137.

¹⁸⁴No. 94-1581, 1996 WL 37973, at *1 (1st Cir. Feb. 6, 1996).

¹⁸⁵*Id.* at *3.

¹⁸⁶716 F.2d 130 (2d Cir. 1983).

¹⁸⁷*Id.* at 134.

simple task of defining the word “vessel” under admiralty jurisdiction. Different criteria used at different times have made the process inconsistent and unpredictable. One could make a claim under the Jones Act and be denied relief because the vessel was not in navigation, but be granted relief under general maritime law because the vessel need not be in navigation, all in the same case!¹⁸⁸ In *Williams v. Avondale Shipyards, Inc.*,¹⁸⁹ “Edgar J. Williams either slipped on an oil spot or became engaged in a fistfight” and “struck a pipe instead of a jaw” during a final sea trial run of the USCG Cutter Hamilton.¹⁹⁰ For purposes of recovery under the Jones Act, the vessel was not yet, at such time, an instrumentality of commerce and, therefore, was not “in navigation.”¹⁹¹ Under general maritime law, however, the vessel did not need to be “in navigation,” and Williams was able to sue the owner for injuries sustained while on the incomplete vessel in navigable waters.¹⁹² As the court in *Salgado v. M.J. Rudolph Corp.*¹⁹³ so aptly noted, “[t]here has been so much litigation over the meaning and scope of the Jones Act that it has been remarked that the Supreme Court should have struck it down ‘as offensive to the due process clause by reason of impossibly bad drafting.’”¹⁹⁴

a. The Car Analogy

As the previous case illustrates, the law does not recognize the same concept of the word “vessel” under all statutes in admiralty. This is an odd notion, given that most people presumably know what a ship or vessel is, much as they do a car.¹⁹⁵ This analogy is better exemplified by the 1919 Supreme Court decision in *McBoyle v. United States*.¹⁹⁶ In that case, the petitioner was convicted of transporting from Ottawa, Illinois to Guymon, Oklahoma an airplane that he knew to have been stolen. The question was whether the National Motor Vehicle Act Theft Act applied to airplanes. The Act stated that “[t]he term ‘motor vehicle’ shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails”¹⁹⁷ Justice Holmes noted:

¹⁸⁸See *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 956-57 (5th Cir. 1971).

¹⁸⁹*Id.* at 955.

¹⁹⁰*Id.* at 956-57.

¹⁹¹*Id.* at 959.

¹⁹²*Hall v. Hvide Hull No. 3*, 746 F.2d 294, 299 (5th Cir. 1984) (referencing the decision in *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958-59 (5th Cir. 1971)).

¹⁹³514 F.2d 750 (2d Cir. 1975).

¹⁹⁴*Id.* at 753 (quoting GRANT GILMORE & CHARLES BLACK, JR., *THE LAW OF ADMIRALTY*, 282 (1st ed. 1957) referring to the Supreme Court’s decision in *Panama R Co. v. Johnson*, 264 U.S. 375 (1924)). Regardless of how badly the Jones Act was drafted, the court in *Leonard v. Exxon Corp.*, 581 F.2d 522 (1978), noted that cases which “deviate from the general practice [of] permitting Jones Act issues to be submitted to the jury . . . should be applied restrictively.” *Id.* at 524.

¹⁹⁵See generally *McBoyle v. United States*, 283 U.S. 25 (1931).

¹⁹⁶*Id.*

¹⁹⁷*Id.* at 26.

No doubt etymologically it is possible to use the word [vehicle] to signify a conveyance working on land, water or air . . . But in everyday speech 'vehicle' calls up the picture of a thing moving on land . . .

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is crossed. When a rule of conduct is laid down in words that evoke in the common mind only [a commonly held notion], the statute should not be extended . . . upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.¹⁹⁸

Justice Holmes' "vehicle essay" can easily be applied in a more present day context. In today's world, cars come in a variety of shapes, sizes, and styles. Numerous types of people drive a car: doctors, students, lawyers, janitors, and grandparents to name just a few. Under one law, a person may get their driver's license revoked for driving while intoxicated,¹⁹⁹ while under another law, a fine may be levied for blasting the car stereo too loudly.²⁰⁰ The serviceman working on your car may be sued for negligent repairs and breach of contract under one law,²⁰¹ or the auto dealer may be required to substitute a new car under some consumer protection "lemon" laws.²⁰² In each case, there is some connection to a car, and a wrong has been committed, yet the answer to "what is a car?" remains the same regardless of which law is applied.²⁰³ Whether the "connection" to the car is by a driver, repairman, or dealer, or whether it is a Cadillac or Jeep, a car has certain and distinct readily identifiable characteristics (i.e. engine, wheels). A car is a car is a car is a car.

¹⁹⁸*Id.* at 26-27.

¹⁹⁹CAL. VEH. CODE § 23153(a) (West 1998). "It is unlawful while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage or drug, to drive a vehicle . . ." *Id.*

²⁰⁰CAL. VEH. CODE § 27007 (West 1985). "No driver of a vehicle shall operate, or permit the operation of, any sound amplification system which can heard outside the vehicle from 50 or more feet . . ." *Id.*

²⁰¹CAL. COM. CODE § 2711 (West 1964). "Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance . . . the buyer may cancel . . ." *Id.*

²⁰²CAL. CIV. CODE § 1793.2 (West 1970). "If the manufacturer or its representative in this state does not service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer . . ." *Id.*

²⁰³*See* CAL. VEH. CODE § 415 (West 1987). "'A motor vehicle'" is a vehicle that is self-propelled." *Id.*; *See also* CAL. VEH. CODE § 100 (West 1987). "Unless the provision or context otherwise requires, these definitions shall govern the construction of this code." *Id.*; CAL. VEH. CODE § 10 (West 1959). "Whenever any reference is made to any portion of this code or any other law, such reference shall apply to all amendments and additions heretofore or hereafter made." *Id.*

Justice Holmes' essay can easily be analogized to the issue of "what is a vessel?" To paraphrase, it is possible to interpret the word vessel by conjuring up all kinds of strange objects that might somehow find their way onto a body of water. Yet, in everyday speech, a vessel, much like a car, has inherent common characteristics. It is only reasonable for the law to take that common understanding of vessel, so that people have an opportunity to gain some knowledge of the rules for which they apply. As the Fifth Circuit noted, "a kangaroo is no less a kangaroo because it is carried for part of its existence in another kangaroo's pouch."²⁰⁴

The rules of statutory construction do "not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended."²⁰⁵ "The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature."²⁰⁶

If the term "vessel" was meant to imply a greater meaning than that which is commonly understood, the drafters of the legislation would have made that point implicitly clear.²⁰⁷ Therefore, we are left with a definition of the term which most ordinary, prudent people commonly hold. As the court in *Sacramento Navigation Co. v. Salz*²⁰⁸ noted, "[t]he fact that we are dealing with vessels, which by a fiction of the law are invested with personality, does not require us to disregard the actualities of the situation"²⁰⁹

Directly on point was the frustration experienced by dissenting Circuit Judge Toreulla in the case of *DiGiovanni v. Traylor Brothers, Inc.*²¹⁰ In that case, the court held that the "BETTY F," which was a steel hulled barge designed to transport cargo, was not a vessel under the Jones Act because it was being used only as a work platform and had no means of self propulsion.²¹¹ Judge Toreulla argued that "[n]otwithstanding the lack of a statutory definition for the term 'vessel' in the Jones Act . . . at least twenty-four maritime or maritime related laws define 'vessel' in such manner as to clearly include the "BETTY F" within the scope of their description."²¹² In his frustration, Judge Toreulla said:

William Shakespeare tells us in a famous passage from *Romeo and Juliet* that labels are not important, but rather that content is what counts. In more recent times, Gertrude Stein had similar advice. Although poetic

²⁰⁴*Farrell Ocean Servs., Inc. v. United States*, 681 F.2d 91, 93 (1st Cir. 1982) (citing *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272, 1278 (5th Cir. 1976)).

²⁰⁵*United States v. Hartwell*, 73 U.S. (6 Wall) 385, 396 (1867).

²⁰⁶*Id.*

²⁰⁷*McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (holding that Congress intended the language of the Jones Act to mean today what it meant at the time the Jones Act was passed in 1920).

²⁰⁸273 U.S. 326 (1927).

²⁰⁹*Id.* at 328.

²¹⁰959 F.2d 1119 (1st Cir. 1992) (Torruella, J., dissenting).

²¹¹*Id.* at 1120.

²¹²*Id.* at 1124.

philosophy seems far removed from the hard world of maritime torts, I believe that the counsel found in those quotations has definite relevance to the issue that separates my views from those of my colleagues in the majority.

“What’s in a name? That which we call a rose
By any other name would smell as sweet.”
Shakespeare, William, *Romeo and Juliet*, II, ii, 43.

“Rose is a rose is a rose is a rose.”
Stein, Gertrude, *Sacred Emily* (1913).²¹³

b. The Three Prong Test

The lack of a generally recognized definition of the word “vessel” is probably inconsequential in a great number of maritime cases, since the structure in question is obviously engaged in the transportation of goods or passengers over water, and fits within the common sense notion of the term. However, problems do arise in trying to determine whether a structure is a “vessel” in cases involving floating docks, ships under construction or out of service, and special function or unusual crafts. Since “[a] jury is too blunt an instrument to answer a complex question of legal policy. . . ;”²¹⁴ a step-by-step procedure could be of great benefit to those whose responsibility it is to determine whether a structure classifies as a vessel. Hence, my three prong test follows.

My three-factor test or three-prong approach provides some guidance through the maze of inconsistency. It is designed to eliminate many of the uncertainties that exist in this area, and create a standard of tests in order to produce more consistent results. These tests mesh all of the critical elements previously discussed into a three-factor examination, in which each factor must be answered in the affirmative in order to continue onto the next level.

The first prong I call the “floatation test.” To meet the requirements of this prong, the structure must comply with the general maritime definition found in the United States Code which states, “[t]he word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”²¹⁵ To paraphrase this definition, all vessels must, at a minimum, float or be capable of floating. The basis for including this requirement rests in the general statutory notion that, to the extent a maritime claim is governed by federal statute, that definition should control, otherwise the general maritime definition of the Code will control.²¹⁶

The test mandates that a structure will not be considered a vessel if it is incapable of independent floatation, or somehow maintains a permanent affixation to land. Conversely, if the attachment to land is merely temporary, or there is no attachment at all, and the structure is capable of floatation, one proceeds to the next factor of the

²¹³*Id.*

²¹⁴*Boy Scouts of America v. Graham*, 76 F.3d 1045 (9th Cir. 1996).

²¹⁵1 U.S.C. § 3 (1994).

²¹⁶*Bollinger Quick Repair, Inc. v. M/V Goliath*, 965 F. Supp. 1448, 1455 (D. Or. 1997).

analysis.

One of more interesting cases was the situation in *Provost v. Huber*.²¹⁷ Paul Huber “purchased a two-story frame house in Bayfield County, Wisconsin with the purpose in mind of moving the structure from the mainland to a lot on Madeline Island situated in Lake Superior. Huber hired a housemover to transport the building and contents by truck-trailer over the frozen surface of Lake Superior.”²¹⁸ “[A]t a point approximately three-fourths of the way to the island, the truck, trailer, house and contents broke through the ice.”²¹⁹ Huber claimed that the tractor-trailer was a “vessel” because he was transporting the house over water. The court declared, “[b]y no stretch of the imagination can we equate a multi-wheeled device, designed and built for the purpose of transportation over a hard, defined surface such as roads, highways, and even ice with a vessel or ship as those terms are useful in maritime law.”²²⁰ Clearly, Huber’s truck was incapable of floatation, and would flunk the first prong of the test.²²¹

In the case of *Nolan v. Coating Specialists, Inc.*,²²² a sand blaster-spray painter was injured while working on a stationary drilling platform in the Gulf of Mexico. He made a claim under Jones Act jurisdiction,²²³ but the court of appeals affirmed the district court’s holding that fixed offshore platforms are not vessels, and workmen who perform all of their duties on such platforms are not seaman.²²⁴

In *Blanchard v. Engine & Gas Compressor Services, Inc.*,²²⁵ George E. Blanchard, a mechanic, was injured while working on compressors located in shallow waters near a marshy area in the Mississippi River delta. Two of the compressors were housed in a building which stood on pilings driven into the ground. The other two compressors were housed in buildings mounted on submersible barges.²²⁶ The court held that the buildings mounted on virtually sunken barges were not vessels under the Jones Act²²⁷ since they were permanently attached to the ocean floor. The court further noted that, “[o]ur holding might be different if

²¹⁷594 F.2d 717 (8th Cir. 1979).

²¹⁸*Id.* at 718.

²¹⁹*Id.*

²²⁰*Id.* at 719.

²²¹An interesting side note about Huber was that a short time later, he “was approached by an individual representing himself to be an underwater contractor and who suggested that the house be sunk to the bottom of the lake to preserve and protect it from ice damage until such time that it could be raised when the weather permitted.” *Id.* Unfortunately for Mr. Huber, he agreed, and the house was lowered to the bottom of the lake by placing sandbags on its floor. When the weather finally warmed up, an attempt was made to retrieve the house, but it was completely destroyed as it was being raised. *Id.*

²²²422 F.2d 377 (5th Cir. 1970).

²²³*Id.* at 378.

²²⁴*Id.* at 379.

²²⁵575 F.2d 1140 (5th Cir. 1978).

²²⁶*Id.* at 1141.

²²⁷*Id.* at 1141-42.

Blanchard had been injured while the structures were being floated into position.”²²⁸ The court’s conjecture presumably depended upon the intended purpose of the barges before they were sunk into place. This leads into Prong two, “Purpose.”

My second prong asks the question, “what is the purpose of the craft?” Under this prong, the analysis is accomplished by using the concepts outlined in two turn of the century Supreme Court cases, *Cope v. Vallette Dry-Dock Co.*²²⁹ and *The Robert W. Parsons*.²³⁰ Here, one looks to “the purpose for which the craft was constructed and the business it which it is engaged.”²³¹ The more modern terminology was developed in 1973 by the Fifth Circuit in the case of *Cook v. Belden Concrete Products, Inc.*²³² In *Cook*, the court defined a vessel’s purpose as being, “designed for transportation of passengers, cargo, or equipment from place to place across navigable waters.”²³³ That definition appears to have been adopted in one form or another by virtually every other circuit.²³⁴

Identifying the purpose is critical because, “[m]ere floatation on water does not constitute a structure a ‘vessel’ . . .”²³⁵ Rafts and special purpose structures get special scrutiny under this query.

This prong is designed to eliminate the absurdity used by some courts in rationalizing their opinions when considering the status of a vessel. It is this liberal interpretation which has sometimes crept its way into the fray, as evidenced by the court’s statement in *McCarthy v. The Bark Peking*,²³⁶ “virtually any capacity for use as seagoing transportation—perhaps even the hypothetically plausible possibility has sufficed to lend the dignity of ‘vessel’ status to a host of seemingly unlikely craft.”²³⁷

In *A Raft of Spars*,²³⁸ the court held that a raft of logs, with no one aboard, floating down the East River was within admiralty jurisdiction.²³⁹ Chief Justice Taney of the Maryland Supreme Court held otherwise in the 1853 case of *Tome v. Four Cribs of Lumber*.²⁴⁰ In that case, Taney said that rafts “are not the subject-matter of admiralty jurisdiction . . .”²⁴¹ “They are not vehicles intended for the

²²⁸*Id.* at 1143, n.5.

²²⁹*See generally* *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887).

²³⁰*See generally* *The Robert W. Parsons*, 191 U.S. 17 (1903).

²³¹*Id.* at 30.

²³²472 F.2d 999 (5th Cir. 1973).

²³³*Id.* at 1002.

²³⁴*See* *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 33 (2d Cir. 1996); *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 647 (1st Cir. 1973); *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984).

²³⁵*Cook*, 472 F.2d at 1001.

²³⁶716 F.2d 130 (2d Cir. 1983).

²³⁷*Id.* at 134

²³⁸20 F. Cas. 173 (S.D.N.Y. 1849) (No. 11,529).

²³⁹*Id.* at 175.

²⁴⁰24 F. Cas. 18 (C.C.D. Md. 1853) (No. 14,083).

²⁴¹*Id.* at 24.

navigation of the sea, or the arms of the sea; they are not recognised[sic] as instruments of commerce or navigation by any act of congress”²⁴² Those words could be probably be applied to any number of special purpose craft today. Compare the case of *Powers v. Bethlehem Steel Corp.*²⁴³ decided 120 years later in which the court held that a raft, made of 12 X 12 timbers bonded together, was not a vessel in spite of its occasional voyages and “brief movement [which] consisted of being hauled, poled or paddled”²⁴⁴ The court stated that the raft’s transportation was “incidental to its intended use.”²⁴⁵

In the case of *Garret v. Dean Shank Drilling Co.*,²⁴⁶ Richie Garret made a claim under the Jones Act for injuries suffered aboard a barge he was working. The barge, moored in the navigable waters of Louisiana, consisted of a hull and flat deck only but was being outfitted with fixtures and appurtenances necessary to render it capable for use as an oil and gas drilling rig.²⁴⁷ The court of appeals agreed with Garret’s employer that the barge was never in navigation for the purpose for which it was intended, and therefore not a vessel in navigation.²⁴⁸

There was also the case of *Wenzel’s Estate by Mirikitani v. Seaward Marine Services, Inc.*²⁴⁹ In that case, Kenneth Wenzel was assigned to clean the hull of the USS Rathburne. “Underwater divers, utilizing hand-held scrapers, brushes and a device known as the ‘SCAMP’, accomplished the cleaning process. ‘SCAMP’ is an acronym for a submersible cleaning and maintenance platform,”²⁵⁰ which was a saucer shaped unit, equipped with an impeller capable of being “operated by remote control or steered manually by divers.”²⁵¹ While he was underwater, cleaning the hull, Wenzel died of asphyxiation. Wenzel’s estate claimed that the “SCAMP” was a vessel, and he was a seaman assigned to it.²⁵² The court of appeals held that it was an error for the district court to determine as a matter of law that the “SCAMP” was not a vessel, and remanded the issue back to them.²⁵³

The harder cases to analyze on this point are those which involve permanent structures, such as offshore drilling rigs, which have to be floated into place before arriving at their final resting spot. Clearly, these structures are not vessels once attached to the ocean or river floor.²⁵⁴ But, the question of their status while being

²⁴²*Id.*

²⁴³477 F.2d 643 (1st Cir. 1973).

²⁴⁴*Id.* at 647.

²⁴⁵*Id.*

²⁴⁶799 F.2d 1007 (5th Cir. 1986).

²⁴⁷*Id.* at 1008-09.

²⁴⁸*Id.* at 1011.

²⁴⁹709 F.2d 1326 (9th Cir. 1983).

²⁵⁰*Id.* at 1326-27.

²⁵¹*Id.* at 1327-28.

²⁵²*Id.* at 1327.

²⁵³*Id.* at 1328.

²⁵⁴*See* *Blanchard v. Engine & Gas Compressor Servs., Inc.*, 575 F.2d 1140 (5th Cir. 1978)

transported into position is an issue.

The court in *Cook v. Belden Concrete Products, Inc.*,²⁵⁵ distinguished two different types of movement for establishing the purpose for which a craft is constructed. The first movement was that of a conventional ship or barge used “for transportation of passengers, cargo or equipment from place to place across navigable waters.”²⁵⁶ The second was the “movement, both perpendicular and lateral, [which] is necessarily part of the regular operation of floating dry docks and similar structures.” Such capability alone, would be “insufficient to establish that such craft are construed for the purpose of navigation.”²⁵⁷

Using these criteria, the positioning of an offshore oilrig, would be movement incidental to its intended function of drilling, and therefore, would not qualify it as a vessel during its temporary transportation. In the case of *Smith v. Massman Construction Co.*,²⁵⁸ the plaintiff was injured while working “as a welder on a structure known as a caisson.”²⁵⁹ “The caisson resembles a large topless steel box approximately 200 feet long, 84 feet wide, and 20 feet high,”²⁶⁰ which was later to become part of a concrete bridge pier.²⁶¹ The court held that the caisson was not a vessel under the Jones Act, even though it carried men and equipment while in tow.²⁶²

My third prong requires a vessel to be “in navigation.” Using the same principle to discount those vessels which have been withdrawn from navigation and those vessels which have not yet entered navigation,²⁶³ only those structures which are at use, temporarily at rest, or undergoing “short term” repairs would qualify as a vessel. This test would eliminate those vessels which have not yet been built, and those which have been totally removed from service. “[A]n incompleting vessel has yet to take her place in commerce and navigation; whereas a vessel which has been commissioned and taken into navigation and commerce remains in that status even when coming into a dock and undergoing certain repairs.”²⁶⁴

In the case of *Caruso v. Sterling Yacht and Shipbuilders, Inc.*,²⁶⁵ Francine Caruso was hired as a cook for the newly constructed vessel, “Bengale I.” “Caruso injured

(holding that a submersed barge, permanently affixed to the ocean floor, was not a vessel).

²⁵⁵472 F.2d 999 (5th Cir. 1973).

²⁵⁶*Id.* at 1002 (holding that the limited movement of a structure is not dispositive of vessel status, but the determinative question of a craft’s status depends on the purpose for which it was constructed and the business in which it was engaged).

²⁵⁷*Id.*

²⁵⁸607 F.2d 87 (5th Cir. 1979).

²⁵⁹*Id.*

²⁶⁰*Id.*

²⁶¹*Id.*

²⁶²*Id.* at 89.

²⁶³*Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 957 (5th Cir. 1971).

²⁶⁴*Id.* at 958, n.5.

²⁶⁵828 F.2d 14 (11th Cir. 1987).

her toe while quartered ashore in a hotel,” and brought an action under the Jones Act.²⁶⁶ Although launched and afloat, the court of appeals affirmed summary judgment for the defendant since the vessel had not been tested at sea trials nor delivered to her owner, and was not yet a vessel “in navigation.”²⁶⁷

Compare the 1983 case of *McCarthy v. The Bark Peking*.²⁶⁸ Craig McCarthy was injured “while painting the upper mainmast and spars of the Bark Peking, a museum vessel on exhibit as one of the artifacts at the South Street Seaport Museum.”²⁶⁹ The vessel’s rudder had been welded into one position, and the ship had not been put to sea for over 50 years.²⁷⁰ The court of appeals nevertheless held that the Peking remained a vessel despite her age and current use “as long as she rides at anchor in the harbor, ready and able to head for the open seas”²⁷¹

A similar situation occurred in *Luna v. Star of India*.²⁷² In this case, a visitor who slipped and fell on a stairway aboard the Star of India, the oldest merchant vessel afloat, built in 1863, brought an action.²⁷³ The ship was operated by the Maritime Museum Association of San Diego, and was moored in North San Diego Bay as a visitor attraction. It had been removed from commerce for over forty years.²⁷⁴ Nonetheless, the court held that the craft was still a vessel under admiralty jurisdiction because “[s]he has a crew consisting of a licensed master or mate, and two or three seaman. Her mooring lines and chains can readily be cast off, and the electric wires are so fitted as to be easily detachable.”²⁷⁵ In addition, visitors “come aboard [her] to enjoy the unique experience of trodding the decks and inspecting the lofty rigging of an old sea voyager,”²⁷⁶ and not “merely to view the memorabilia collected below in a few glass cases”²⁷⁷

Finally, an example of a vessel removed from service was the case of *Kathriner v. UNISEA, Inc.*²⁷⁸ The court of appeals affirmed the district court’s holding that the hull of a liberty ship which had been converted into a floating fish factory, but which was permanently anchored and tied to a dock, “hooked up to city sewage, city water mains, telephone lines and cable television,”²⁷⁹ was not a “vessel in navigation” for

²⁶⁶*Id.* at 15.

²⁶⁷*Id.* at 15-16.

²⁶⁸716 F.2d 130 (2d Cir. 1983).

²⁶⁹*Id.* at 132.

²⁷⁰*Id.*

²⁷¹*Id.* at 135-36.

²⁷²356 F. Supp. 59 (S.D. Cal. 1973).

²⁷³*Id.* at 60.

²⁷⁴*Id.*

²⁷⁵*Id.* at 66 (quoting *The Showboat*, 47 F.2d 286 (D. Mass. 1930)).

²⁷⁶*Id.*

²⁷⁷*Luna*, 356 F. Supp. at 66.

²⁷⁸975 F.2d 657 (9th Cir. 1992).

²⁷⁹*Id.* at 658-59.

purposes of the Jones Act.²⁸⁰ The court stated that the vessel was unfit for offshore use, and would surely sink if put out to sea.²⁸¹

In summary, all three prongs need to be satisfied for a structure to be termed a vessel. Failure to satisfy any one of the above tests will condemn the structure to non-vessel status, and disqualify any person making a claim under such a presumption.

The three prong test has universal application as well. There are many admiralty statutes which relate specifically to an area of law, and which provide relief depending on certain circumstances. For example, under the Longshore and Harbor Workers' Compensation Act, whether one is or is not a "member of the crew" is a vital consideration when making a claim.²⁸² Under the Jones Act, a seaman, or his personal representative in case of the death of any seaman must make a claim.²⁸³ The Death on the High Seas Act created a wrongful death action for persons killed on the high seas.²⁸⁴ Nevertheless, the three prong test could be adopted to determine vessel status in any of these admiralty statutes. Although these statutes define specific requirements concerning the individual making the claim, and the relationship that they must maintain with their employer or to a vessel, the notion of "what is a vessel?" suggests that an independent analysis can be made in isolation, apart from the other statutory factors.

c. Airplanes and Helicopters

To challenge the methodology of my three prong test by using it to determine whether floating docks and underwater diving platforms are "vessels" would prove too easy. A much harder test, and the real opportunity for criticism comes on the test's ability to identify jet aircraft as vessels in light of the history on the subject.

The notion of considering airplanes and helicopters as performing some kind of traditional maritime activity is a strange concept to many, and seems to stretch the statutory interpretation of "vessel" to its limit. Nonetheless, under certain circumstances these structures have been included under admiralty jurisdiction. The "high-water" mark in this area of law was the Supreme Court's 1972 decision in *Executive Jet, Inc. v. City of Cleveland*.²⁸⁵ In that case, the Court held that claims

²⁸⁰*Id.* at 663.

²⁸¹*Id.* at 660.

²⁸²*See* 33 U.S.C. §§ 901-950 (1994).

²⁸³*See* 46 U.S.C. § 688 (1994).

²⁸⁴*See* Death on the High Seas Act, ch. 111, §§ 1-8, 41 Stat. 537-538, (1920) (codified at 46 U.S.C. app. §§ 761-768 (1994)).

²⁸⁵409 U.S. 249 (1972). In this case a jet aircraft "struck a flock of seagulls as it was taking off from Burke Lakefront Airport in Cleveland, Ohio, adjacent to Lake Erie. As a result, the plane lost its power, crashed and ultimately sank in the navigable waters of Lake Erie, a short distance from the airport." *Id.* at 250.

The Supreme Court held that the location of the incident by itself was not demonstrative of a maritime tort,

unlike waterborne vessels, [aircraft] are not restrained by one-dimensional geographic and physical boundaries. For this elementary reason, we conclude that the mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters--whatever that means in an aviation context--is not of itself sufficient to turn an airplane

arising from airplane accidents may be cognizable under admiralty jurisdiction if the “wrong bear[s] a significant relationship to traditional maritime activity.”²⁸⁶ As a result of this landmark decision, most aviation admiralty tort cases are regarded as either “pre-*Executive Jet*,”²⁸⁷ or after *Executive Jet*.

Generally speaking, aircraft are not considered to be vessels for purposes of invoking admiralty jurisdiction. Looking at previous definitions of vessel as already identified in the Act of 1866, and the Revised Statutes, it is certain that Congress did not have airplanes in mind when they defined “vessel,” since both of those statutes derive from enactments prior to its invention.²⁸⁸ Even by 1920, and the passage of the Jones Act, “it can hardly be thought that, Congress intended or believed that the term ‘vessel’ included the primitive aircraft then in use.”²⁸⁹ But, “statutes are not confined in application to contemporary instances and that their principles are to be extended to embrace new factual situations and new technological developments.”²⁹⁰ “[F]or Jones Act purposes, the term vessel may include ‘special purpose structures’ . . . even though such structures were not conceived of until long after the Jones Act was adopted.”²⁹¹

Some courts still hold that helicopters perform a traditional maritime activity when transporting passengers and supplies to offshore sites.²⁹² The Supreme Court

negligence case into a ‘maritime tort.’ It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. *Id.* at 268.

The result of *Executive Jet* was the development of a two-part “locality plus” test in defining an aviation maritime tort. That test requires a showing that: (1) the alleged wrong occurs over navigable water, and (2) the wrong bears a significant relationship to a traditional maritime activity. *Id.* at 271.

The Supreme Court had little difficulty in concluding that “a flight that would have been almost entirely over land and was within the continental United States” bore an insufficient relationship with traditional maritime activity.” *Id.* at 272. But, the Court left the door open regarding the possibility that an aircraft could be engaged in a maritime activity during a transoceanic flight,

We need not decide today whether an aviation tort can ever, under any circumstances, bear a sufficient relationship to traditional maritime activity to come within admiralty jurisdiction in the absence of legislation. It could be argued, for instance, that if a plane flying from New York to London crashed over the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute. An aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels. *Id.* at 271.

²⁸⁶*Id.* at 268.

²⁸⁷*Hubschman v. Antilles Airboats, Inc.*, 440 F. Supp. 828, 836 (D.C.V.I. 1977) (referring to some of the “pre-*Executive Jet*” confusion as to when admiralty jurisdiction attaches).

²⁸⁸*Smith v. Pan Air Corp.*, 684 F.2d 1102, 1113 (5th Cir. 1982).

²⁸⁹*Id.*

²⁹⁰*Id.*

²⁹¹*Id.*

²⁹²*See Comind, Companhia de Seguros v. Sikorsky*, 116 F.R.D. 397, 416 (D. Conn. 1987) (holding that a helicopter “used to ferry passengers and supplies to and from off-shore drilling structures . . . bears a significantly sufficient relationship to traditional maritime activity . . .

has not revisited this issue, causing some consternation in the lower courts. One court noted, “there is still unheeded the call for the Supreme Court to . . . review a case and either accept the expansionist view of admiralty jurisdiction [regarding aircraft] and provide proper guidelines for the application of such jurisdiction or it should clearly limit the jurisdiction to traditional matters of a maritime nature. . . .”²⁹³

In those instances when airplanes and helicopters are allegedly engaged in a “traditional maritime activity,”²⁹⁴ my three prong test can be a useful tool in the determining the vessel status of these structures. To do such an analysis will take no more of an ideological leap than the Supreme Court itself took in *Executive Jet* when making the inference.²⁹⁵

The first prong of my test emphasizes the general maritime definition, which requires that an object must be capable of floatation.²⁹⁶ Clearly, jet airplanes are not designed for floatation.²⁹⁷ So, one may immediately think that an airplane is doomed from the outset of the test, failing the first prong, and requiring no further analysis. This is an incorrect assumption.

Using a more conceptual approach, the airplane itself is not designed to float, but certainly its passengers are. All airplanes making transoceanic flights are equipped with inflatable rafts, life preservers for each passenger, and a variety of other paraphernalia available to crewmembers should the plane go down over the ocean.²⁹⁸ This distinction is made to differentiate airplane passengers, from say bus or train riders, who have no access to overwater life saving gear.

Airplanes traveling over land from point to point within the continental United States would normally not be required to carry this specialized equipment.²⁹⁹ The idea is directly on point with the Supreme Court’s statement that “flights within the continental United States, which are primarily over land” would not be considered a traditional maritime activity.³⁰⁰ Case law also clearly supports this theory. A review of *Reeves v. Offshore Logistics, Inc.*³⁰¹ indicates the courts refusal to acknowledge that a helicopter without pontoons could be engaged in a traditional maritime activity,³⁰² but one containing all the accouterments of a flying “vessel” could meet

.”). *Id.*

²⁹³Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 836 (D.C.V.I. 1977) (quoting Thomas O. White, *The Admiralty Jurisdiction Adrift*, 28 PITT. L. REV. 635, 642 (1967)).

²⁹⁴See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 257 (1972) (bringing a tort under federal admiralty jurisdiction requires “some relationship between the tort and traditional maritime activities . . .”).

²⁹⁵*Id.* at 271.

²⁹⁶See 1 U.S.C. § 3 (1994).

²⁹⁷49 U.S.C. §§ 40101-49105 (1994)). “[A]ircraft” means any contrivance invented, used, or designated to navigate, or fly in, the air.” 49 U.S.C. § 40102(a)(6); “‘Aircraft’ means a device that is used or intended to be used for flight in the air.” 14 C.F.R. § 1.1 (1998).

²⁹⁸14 C.F.R. §§ 25.801, 25.1411, 25.1415 (1998).

²⁹⁹14 C.F.R. § 25.1411 (1998).

³⁰⁰*Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 266 (1972).

³⁰¹720 F.2d 835 (5th Cir. 1983).

³⁰²See *id.* at 836.

the *Executive Jet* test.³⁰³

Therefore, although airplanes themselves are not floatable objects, those on board are definitely equipped to handle an unexpected watery landing. In this view, an airplane can be considered as having the “capability”³⁰⁴ of floating on water, and thus satisfying the first prong of the test.

The second phase of the three prong test requires that a structure’s purpose be the transportation of cargo or people across navigable water. Certainly, aircraft are in business of commerce, and transport people and things from place to place.³⁰⁵ By conceding that an aircraft, flying at 30,000 feet over the ocean, is engaged in the transportation of people and cargo “across” water, one uses the same premise as that applied by the Supreme Court in their *Executive Jet* decision when they indicated that an overseas flight might be considered an activity which is traditionally maritime in nature.³⁰⁶ Therefore, the second prong of the test has been satisfied.

The third prong of the test requires that a vessel be “in navigation.” In terms of aviation, this translates into actual flight or preparation for such.³⁰⁷ Thus, the third prong is met.

As indicated, the three prong test has multiple uses, and can easily be adapted to a variety of circumstances, including those cases involving helicopters, airplanes and other unusual, special function watercraft. The test is easy to administer, and should prove helpful in providing additional guidance for the courts as they continue to struggle with trying to identify uniform characteristics common to all vessels.

IV. CONCLUSION

One may take the position that very few differences exist amongst the circuits with regards to their interpretation of the word vessel, and that most opinions ultimately reach the same conclusion. Others subscribe to the fact that each jurisdiction has created their own unique “twist” on the issue, and prescribed just how to address the question. Whichever view is taken, a clear and straightforward approach would nonetheless benefit all involved.

The use of my three prong test should eliminate some of the ambiguities that appear to exist, and provide a more consistent result. Every year, it seems, new kinds of waterborne craft are introduced into the marketplace. Nevertheless, my three prong test is capable of successfully analyzing situations concerning both the

³⁰³See *id.*; see generally *Cesar v. United Tech.*, 562 N.Y.S.2d 903 (N.Y. Sup. Ct. 1990).

³⁰⁴See 1 U.S.C. § 3 (1994). “The word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as means of transportation on water.” *Id.*

³⁰⁵14 C.F.R. § 1.1 (1998). “‘Air commerce’ means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.” *Id.*; “‘Air transportation’ means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.” *Id.*

³⁰⁶See generally *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

³⁰⁷49 U.S.C. § 40102(a)(6) (1998). “[A]ircraft’ means any contrivance invented, used, or designed to navigate, or fly in, the air.” *Id.*

newest technologies, as well as the most mundane of cases. For those whose responsibility it is to determine “what is a vessel?” in the surrounds of a judicial proceeding, the three part test should be a welcome sight on the nautical horizon.